SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 26 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1964

No. 937

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LEONARD FELDMAN,
Attorney for Petitioner,
350 Fifth Avenue,
New York, New York.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Proceedings Below	2
Questions Presented	3
Constitutional Provision Involved	3
Statement	4
Reasons for Allowance of the Writ	11
The Significance of the Issue in Relation to Punishment	15

Cases Cited

Adamson v. *People of California*, 332 U. S. 46, 91 L. E. 1903, 67 S. Ct. 1672	13
Berger v. *U. S.*, 295 U. S. 78, 79 L. E. 1314, 55 S. Ct. 629	11
Brady v. *State of Maryland*, 373 U. S. 83, 10 L. E. 2nd 215, 83 S. Ct. 1194	14, 16
Griffen v. *U. S.*, 183 F. 2d 990	14
Lisemba v. *California*, 314 U. S. 219, 86 L. E. 166, 62 S. Ct. 280	13
People v. *Savvides*, 1 N. Y. 2d 554	12, 13
U. S. ex rel. Meers v. *Wilkins*, 326 F. 2d 135	14
U. S. v. *Ragen*, 86 F. Supp. 382	14
U. S. v. *Spangelet*, 258 F. 2d 338	14
U. S. v. *Zborowski*, 271 F. 2d 661	13

IN THE

Supreme Court of the United States

OCTOBER TERM—1964

No.

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner above-described, respectfully prays that a writ of certiorari issue in the above captioned case directed to the Court of Appeals of the State of New York to review its order of affirmance dated and entered December 3, 1964. (See certified record submitted herewith.)

Opinions Below

The only opinion issued in this proceeding was that of the Supreme Court of the State of New York, Appellate Division, First Department, on September 24, 1963, 20 A.D. 2d 218, 246 N.Y.S. 2d, 303.

Jurisdiction

The order of the Court of Appeals sought to be reviewed was dated and entered December 3, 1964. Therefore, the time within which this petition for writ of certiorari might be secured will expire on March 3, 1965.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below

By petition verified December 15, 1960, the respondent Co-ordinating Committee on Discipline brought a disciplinary proceeding against the petitioner herein. Thereafter and pursuant to an order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 13, 1961, a Referee was appointed to take testimony and report. Hearings were held and on June 25, 1963, the Referee reported to the Appellate Division sustaining certain of the charges and recommending dismissal of others.

Thereafter, the respondent herein moved to confirm the Referee's report in certain respects and to disaffirm it in other respects. Petitioner herein cross-moved for similar relief and squarely presented the constitutional questions here involved. By order dated January 30, 1964, the Appellate Division, First Department, disbarred the petitioner.

Thereafter, the parties herein moved for leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals from the said order of disbarment. By order dated March 24, 1964, the Appellate Division denied both the motion for reargument, or in the alternative, for leave to appeal to the Court of Appeals.

Thereafter, the petitioner herein appealed as of right to the Court of Appeals on the constitutional issue of due process. The respondents herein moved in the Court of Appeals to dismiss the appeal on the ground that no substantial constitutional question was involved in the petitioner's appeal. The respondents' motion to dismiss the appeal was denied by the Court of Appeals by its order dated December 3, 1964.

The Court of Appeals heard the petitioner's appeal on the constitutional issue and affirmed the order of the Appellate Division below, without opinion.

Questions Presented

1. Did the suppression of evidence by the respondents, which evidence was favorable to the petitioner, violate due process where such evidence was material to the guilt of the petitioner or the discipline to be meted out to him?

2. The Court of Appeals of New York having ruled that a disciplinary proceeding against an attorney is covered by the statutes and rules of procedure pertaining to civil proceedings, is the suppression of evidence by a prosecutor in such a disciplinary proceeding a denial of due process under the Fourteenth Amendment of the Constitution of the United States?

Constitutional Provisions Involved

The provision of the Constitution of the United States involved herein is the Fourteenth Amendment, the pertinent section of which is as follows:

> "Section 1 * * * nor shall any state deprive any person of life, liberty or property, without due process of law; or deny to any person within the jurisdiction the equal protection of the law."

Statement

Of the charges against the petitioner submitted to the Referee, the Referee held that the charges had been sustained as follows:

Charge 1—In the prosecution of personal injury claims knowingly submitting false loss of time and earning claims to an insurance carrier (2 instances).

Charge 2—Conspiring to submit false personal injury claims to an insurance carrier (1 instance).

Charge 6—Settling claims of infants without procuring court orders approving such compromises and fixing legal fees (2 instances).

Charge 8—Using the name of another attorney, with his permission, to prosecute an action or claim.

Charge 9—Failure to preserve complete files pursuant to Rule IV-F of the Special Rules of the Appellate Division, First Department of the Supreme Court of the State of New York (now Rule 4(6)).

On the motion to confirm the Referee's report, the Appellate Division confirmed the report in all respects except that it added an additional specification as being sustained in Charge 1 (the Referee had found that such specification had not been sustained), and also reversed the Referee and found that Charge 4 had been established by respondents. Charge 4 accused petitioner of payments to one, Benjamin, an insurance carrier employee, to corruptly influence settlements.[1] The only evidence to sup-

1. The First Department on an identical charge, involving the same employee's identical accusation against another attorney and on stronger evidence, confirmed a referee's report which found Benjamin completely unworthy of belief (as did the Referee here). Matter of Greenberg (1963), 19 A.D. 2d 375.

port this charge was the uncorroborated testimony of Benjamin appearing as a witness for respondents. On this charge, evidence had also been suppressed by respondents.

The Appellate Division took cognizance of the "due process" issue and wrote as follows:

> "We have examined the record in the light of the contention that the requirements of due process were not met. This is largely founded on the allegation that testimony was adduced by promises of leniency made by the Assistant District Attorney who presented the matters involved to a New York County Grand Jury and who was trial counsel for petitioner in this proceeding. It is also asserted that false testimony was adduced in this proceeding to the knowledge of petitioner's trial counsel. A careful examination of the record establishes no factual basis for these contentions. The record demonstrates that the matter was fully, fairly and scrupulously presented."

Although the Appellate Division referred to the suppression of evidence as a mere "allegation" of such suppression, as will be seen in a later section of this brief, it cannot be disputed that the record discloses more than a mere "allegation". Uncontroverted proof of suppression was presented.

The issue of due process is directly involved in Charges 1, 2 and 4, for it was in connection with these charges that evidence was suppressed. The effect of such suppression permeated the other charges as well. There can be no doubt that the seriousness of Charges 1, 2 and 4 was of overwhelming influence in determining the decision of the Appellate Division to disbar the appellant.

It need not be argued that the responsibility of a prosecution is as great in a disciplinary case as in a criminal case. In a disciplinary proceeding the prosecution not only has the burden of producing all evidence unfavorable to a respondent, it also has the burden of producing all the evidence that is favorable to a respondent.

In briefest summary, the facts relating to the suppression of evidence follow.

Charge 2—The "Kaston" Conspiracy

Alvin Kaston, a client of petitioner, and three of Kaston's employees conspired together to present false and fraudulent personal injury claims to an insurance carrier. After the scheme was hatched and through Kaston, petitioner was retained to represent the employees. The only witness who accused petitioner of knowingly participating in the scheme was Kaston himself, and even he was not too positive. Kaston's employees, however, effectively exonerated the petitioner of any knowledgeable participation in the conspiracy (1152-1153, 1823-1824).[2] The evidence of petitioner's innocence of any knowledge of the falsity of the claims was substantial (677-679, 454, 459-461, 1633, 1141-1142, 1556, 1152-1153, 1823-1824). Kaston even arranged for his own personal physician to support the false claims of injury by his employees—a physician unknown to petitioner and with whom petitioner had absolutely no dealings (617, 2267).

When the fraud was uncovered, the employees exonerated the petitioner of complicity in the conspiracy to the insurance carrier's investigators (Exs. 9-E, 9-F, 15-C, 15-D). That exoneration carried through to the investiga-

2. Parenthetic references are to the transcript of testimony, unless otherwise noted.

tion into the fraud being conducted by Mr. Harris, a then assistant District Attorney in New York County.[3]

Alvin Kaston was indicted for grand larceny. Thereafter he pleaded guilty to a petit larceny charge, made full restitution and received a suspended sentence (954, 2731-2748, 2772-2777).

At the hearings before the Referee Kaston denied any knowledge of how it came about that he was allowed to plead guilty to petit larceny, a misdemeanor, after being indicted on four felony counts.

> "Q. Are you aware of the fact that you were indicted for grand larceny and that you were permitted to plead—were you aware of the fact that you were indicted for grand larceny and permitted to plead to petit larceny? A. Yes, sir.
>
> "Q. *How did that come about, do you know?* A. *No, sir*" (954, emphasis supplied).

Mr. Harris sat silent and said nothing.

Eight months later, long after the disciplinary hearings were concluded, Mr. Harris admitted under oath that he, as an assistant District Attorney, had made a "deal" with Kaston, which took several conferences to arrange, to recommend to the court acceptance of a petit larceny plea on condition that Kaston involve the petitioner in the conspiracy to defraud the insurance carrier (2724-2726, 2731-2743, 2746-2747).

Charge 1—Irving Blum

When Irving Blum, a client of petitioner, was first interrogated by respondents *in camera* and under oath, he exculpated the petitioner of any involvement in the

3. It was this same Mr. Harris who was respondent's trial counsel in the prosecution of the respondent's charges against petitioner.

charge. At the disciplinary hearings before the Referee, however, Mr. Blum and his wife directly inculpated the petitioner.

Eight months after the hearings were closed, Mr. Harris admitted, under oath, that Blum had changed his story in the course of a pre-trial preparation session with Mr. Harris. He also admitted that Blum and his wife asked him not to call Blum's mother as a witness (2779-2783, 2802, 2805, 2790-2791). Although a case involving Blum's mother was also the subject of a charge against petitioner, after Blum, corroborated by his wife, had seriously involved the petitioner, the charge involving Blum's mother was dropped and Blum's mother was never called as a witness.

It is reasonable to conclude that Blum changed his testimony in order to prevent his mother being called as a witness.

When Mr. Harris, on the stand, was asked whether he paid any attention to the fact that Blum was going to testify to facts materially and substantially contrary to Blum's prior testimony under oath, Mr. Harris blandly stated that he paid no attention to such inconsistencies, commenting that the task of resolution of such inconsistencies was the task of the Referee (2782).

Charge 1—Alvin Denbaum

Although this specification was not sustained by the Referee or the court, it corroborates the pattern of suppression here involved.

In this case, Mr. Denbaum's *in camera* testimony before the Co-Ordinating Committee on the occasion of his first appearance, and under oath, did not implicate the petitioner in any professional misconduct (302-305). There-

after, he was called before an assistant District Attorney and, after appearing at the District Attorney's office (253), he appeared *in camera* again before the Co-Ordinating Committee and involved the petitioner in the use of an allegedly false letter of employment to support a claim of damage being made by Denbaum in a personal injury case (351-353). Between his first and second appearances before the Co-Ordinating Committee, Mr. Denbaum had been told by no less than an assistant District Attorney that his testimony before the Co-Ordinating Committee had been false (281); had been advised by that same personage that "they" (otherwise unidentified) were interested in getting the petitioner and not Mr. Denbaum (283); and, *that if he would go along and work with "them", "they" would do nothing about his having defrauded the insurance company* (282).

It was following the foregoing goad to his self-interest that Mr. Denbaum for the first time told anyone that the letter of employment (Ex. 5A-1) was false; *permitted himself to be fitted with a recording device* (292); *was supplied with a number of questions to ask the petitioner (in the hope, one supposes, that the petitioner would utter some self-incriminating statements)* (278-279); and, after failing to induce the petitioner to say anything of an incriminating nature, appeared before the Co-Ordinating Committee to tell them that the petitioner knew that the employment letter was false (351-353).

As in the Benjamin and Kaston matters, here again we have a repeat of the pattern of the obtention of an inculpatory statement from a witness through the use of the device of promising a witness freedom from or leniency in prosecution in return for an accusation against petitioner.

As in the Kaston, Blum and Benjamin cases, Mr. Harris did not reveal that Denbaum had not made his accusation until he received a promise of immunity or other consideration for doing so. Those facts came out on cross-examination. That the circumstances which induced Denbaum's testimony were adduced on cross-examination was providential. Had Denbaum chosen to lie and to deny the inducement the charge against petitioner would, in all probability, have been sustained.

Charge 4—Stanley Benjamin

Stanley N. Benjamin was an insurance company adjustor. Respondents charged that the petitioner paid Benjamin 5% of the gross settlement amounts of a number of cases that petitioner settled with Benjamin's company. With regard to the evidence to support such charge, the only evidence produced by respondents was that of Benjamin himself. Manifestly, the credibility of Benjamin as a witness was vital to respondents' case.

Although the Referee found that respondents had not sustained the charge, the issue of suppression also permeated the Benjamin issue. (The Appellate Division set aside the Referee's holding and sustained the charge.)

Benjamin had testified to a transaction with Mr. Harris, then an assistant District Attorney, relating to the circumstances under which he first involved the petitioner. As in the Kaston case, Benjamin's pose was that of a former sinner now trodding the path of rectitude and honesty. Although Mr. Harris knew, as was later disclosed, that Benjamin was not telling the truth before the Referee (at least according to Mr. Harris), he sat silent and allowed Benjamin to so testify without disclosing the true nature of the transaction. It was 8 months

after the hearings were concluded that Mr. Harris first disclosed that Benjamin had been lying while on the stand.

As has been demonstrated, in instance after instance, evidence which went to the substance of the charges or the credibility of respondents' witnesses was not disclosed. How much other such evidence exists petitioner does not know.

When this issue of suppression of evidence was brought to the attention of the Referee,[4] respondents took the position that: "*No vital evidence was withheld* by petitioners." (See petitioners' supplemental brief before the Referee, page 1, *emphasis supplied.*)

Curiously, there is no mention of this entire issue in the Referee's report.

Reasons for Allowance of the Writ

The disbarment of an attorney accomplished by the suppression of evidence effects a fundamental denial of due process which affects not only the petitioner, but also the entire administration of justice.

The record below conclusively shows that evidence going both to guilt and to the degree of punishment was suppressed during the course of the hearings before the Referee. In suppressing such evidence, trial counsel for the respondents violated his obligation to ensure petitioner a full and fair trial.

This Court described the obligation in *Berger* v. *U. S.*, 295 U. S. 78, at page 88, as follows:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a

4. The issue of suppression of evidence and the resultant denial of due process were the subjects of the additional hearings of February 18, and February 21, 1963.

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should so do. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Is the obligation of counsel in a disciplinary proceeding any less than that of an assistant U. S. Attorney?

The reason for the requirement of full disclosure relates to the quality of evidence and is very pungently set forth in *People* v. *Savvides,* 1 N. Y. 2d 554, where the court unanimously made the following statement at pages 556 and 557:

> "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. * * *
>
> "It is of no consequence that the falsehood bore upon the witnesses' credibility rather than upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

The court continued at page 558:

> "Convincing though proof of guilt may be, and there can be no denial of its strength in this case, we could here affirm 'only if' were to announce

> a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt' (People *v.* Mleczko, supra, 298 N. Y. 153, 1963). We were not in Mleczko, and we are not now, prepared to announce such a doctrine."

There is no position to be taken that *People* v. *Savvides* was a criminal case and hence not applicable to a disciplinary proceeding. That case dealt with the quality of evidence. Does anyone by any stretch of imagination believe that false testimony is of better quality if given in a civil proceeding? Would anyone want to argue that such evidence is of better quality in a disciplinary proceeding?

Evidence of value to the petitioner's defense and known to respondents' trial counsel, was withheld from respondent. The law throughout the United States is clear. A denial of due process occurred.

This Court, in *Lisemba* v. *California*, 314 U. S. 219, 236, held that, "the failure to observe that fundamental fairness essential to the very concept of justice," is what constitutes a denial of due process. See also, *Adamson* v. *People of California*, 332 U. S. 46.

In the United States Circuit Court of Appeals for the Second Circuit where the issue was inconsistency between testimony and prior statements under oath before a grand jury, a unanimous court in *U. S.* v. *Zborowski* (CC2), 271 F.2d 661, reversed a conviction and held, at page 668:

> "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the govern-

> ment disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuing a conviction."

The court went on, at page 668:

> "Our standards of fair play in criminal proceedings require that the government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it places on the stand."

See also, *U. S.* v. *Spangelet,* 258 F.2d 338, 342.

In *U. S.* v. *Ragen,* 86 F. Supp. 382 (D.C. Ill.), the court stated, at page 387:

> "A prosecutor must, to be fair, not only use the evidence against the criminal, but must not unwillingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged."

See also, *Griffen* v. *U. S.,* 183 F. 2d 990, 993.

In *Brady* v. *State of Maryland* (1963), 373 U. S. 83, 83 S. Ct. 1194, it was stated, at page 104:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Following *Brady,* the Second Circuit in *U. S. ex rel. Meers* v. *Wilkins,* 326 F. 2d 135, held that the request for production is not the critical element and ruled that a

failure to produce evidence favorable to an accused, regardless of demand therefor, constitutes a denial of due process.

It is respectfully submitted that the issue of due process is real and compelling. The fact that most of the cases cited are criminal cases in no wise reduces their significance to this proceeding. They concern themselves with the conduct of trials and not with the quantum of proof.

The Significance of the Issue in Relation to Punishment

Although it is manifest that a trial which is fatally defective because a denial of due process has occurred, renders the entire trial a nullity, in the case at bar there is a further issue raised by what occurred.

If the Referee had found that Charges 1, 2 and 4 had not been sustained, but that Charges 6, 8 and 9 had been sustained, the Appellate Division would have faced a very real issue with regard to the measure of discipline to be meted out. This is especially true in the light of the mitigating circumstances noted by the Referee in his report. Thus, there was no finding by the Referee or the Appellate Division that the respondent was guilty of any corrupt, improper or venal motive in relation to Charges 6, 8 and 9. On the other hand, the nature of Charges 1, 2 and 4 are such as to render consideration of Charges 6, 8 and 9 academic. In the light of the respondents' record of public service and his unblemished professional record, the Appellate Division's view of the respondent, in all likelihood, would have been materially different if all it had before it were Charges 6, 8 and 9.

It is submitted, therefore, that the withholding of evidence necessarily affected not only the merits of the

conclusion below, but also the discipline to be imposed. It is in this manner that appellant has been prejudiced as well, for it is settled that a withholding of evidence that affects punishment is as much a denial of due process as a withholding of evidence that affects the guilt or innocence of the accused.

> *Brady* v. *State of Maryland,* 373 U. S. 83, 104, 83 S. Ct. 1194, 1196-1197 (1963).

CONCLUSION

It is respectfully submitted that sound reason exists for this court noting jurisdiction and granting the writ sought.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioner.